No. 84-1009

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JON C. BAILEY, RANDY E. McCASLIN,
JOHN R. FINDLAY and RODNEY LEIFHEIT,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The
Appellate Court Of Illinois, Second Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether petitioners have presented a substantial federal question where this Court's decisions in *Hamling v. United States* and *Ward v. Illinois* dispose of their claim?

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JURISDICTION

The jurisdictional requisites are adequately set forth in the petition. However, as treated more fully in the argument contained herein, respondent does not believe that petitioners have shown any reason for this Court to exercise its sound judicial discretion to grant the writ.

REASONS FOR DENIAL OF THE WRIT

PETITIONERS HAVE FAILED TO PRESENT A SUBSTANTIAL FEDERAL QUESTION WHERE THIS COURT'S DECISIONS IN *HAMLING V. UNITED STATES* AND *WARD V. ILLINOIS* DISPOSE OF THEIR CLAIM.

Petitioners contend that their indictments for obscenity are defective because they do not incorporate the tripartite definition of obscenity adopted by the Illinois Supreme Court in *People v. Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (1974), *People v. Ward*, 63 Ill.2d 437, 349 N.E.2d 47 (1976), and *People v. Gould*, 60 Ill.2d 159, 324 N.E.2d 412 (1975). This Court, however, has expressly rejected the claim that due process requires the term obscenity to be defined in an indictment. *See Hamling v. United States*, 418 U.S. 87, 119 (1974). Accordingly, petitioners have failed to present a substantial federal question for review.

In *Hamling*, this Court reiterated that as judicially construed both prior to and after *Miller v. California*, 413 U.S. 15 (1973), the federal obscenity statute prohibiting the mailing of "obscene, lewd, lacivious or filthy" material is not unconstitutionally vague for failing to provide a defendant reasonably ascertainable standards of guilt. 413 U.S. at 116; 18 U.S.C. §1461. This Court further recognized that because "obscene" is a legal term which has been sufficiently explicated to give a defendant notice of the charge against him, its definition need not be included in the indictment. *Id.* at 119. Seeking to distinguish *Hamling*, petitioners charge that the Illinois statute "is a patchwork of borrowed First Amendment principles that fail to guide a criminal defendant in the constitutional sense." (Petition at 7) This suggestion, however, wholly ignores *Ward v. Illinois*, 431 U.S. 767 (1976), wherein this Court found it to be at least as clear as in *Hamling* that the

statute as construed by the Illinois courts conforms to *Miller*'s notice requirements. *Id.* at 774-76. In any event, as in *Ward*, petitioners cannot claim that the statute gave them no notice that the specific conduct with which they were charged was proscribed by Illinois law. *See id.* at 771-73.*

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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* The indictments in the present case charged petitioners with selling materials depicting such acts as anal intercourse, group masturbation, fallatio, cunnilingus, and rectal insertion of prosthetic devices. (*See* Appendix to the People's brief on appeal)